In the Supreme Court of the United States

OCTOBER TERM, 1944.

No. . . . .

GEORGE AND FRANCES BALL FOUNDATION,

Petitioner,

vs.

H. EARL COOK,
Superintendent of Banks of the State of Ohio in Charge of the Liquidation of The Union Trust Company, Cleveland, Ohio, Trustee,

Respondent.

BRIEF OF PETITIONER IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

OPINIONS BELOW.

Neither the opinion of the District Court nor the opinion of the Circuit Court of Appeals has yet been reported. The opinion of the Circuit Court of Appeals is printed at pages 3034-3060 and 3072-3073 of the record. The opinion of the District Court is printed at pages 2957-2962 of the record.

JURISDICTION.

Judisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925 (U. S. C. Title 28, Sec. 347 (a)). The judgment of the Circuit Court of Appeals was entered July 7, 1944. The petition for certiorari has been filed within three months of that date.

STATEMENT OF THE CASE.

A statement of the case is set out in the petition for certiorari (*supra* pages 2 to 9) and will not be here repeated.

ASSIGNMENTS OF ERROR.

The Circuit Court of Appeals erred in each of the following particulars:

1. In failing to follow the applicable local decisions which hold a claim like that asserted by respondent to be contrary to public policy and unenforceable, i.e., a claim founded on a serious breach of fiduciary duty by the dominant officers and directors of corporations.
2. In holding that a claim based on the violation of fiduciary duty by dominant officers and directors of a corporation involves no question of public policy.
3. In holding that the illegal agreement here involved has been completed.
4. In holding that petitioner may not assert the defense of illegality.
5. In enforcing a claim which is in violation of federal public policy, i.e., a claim based on a serious violation of fiduciary duty by the dominant officers and directors of corporations.
6. In failing to follow the rule with respect to the enforcement of an illegal contract established by this Court in *McMullen v. Hoffman*, 174 U. S. 639.
7. In failing to apply correctly the applicable principles of quasi-estoppel.
8. In holding that the agreement Ball and Tomlinson made with Van Sweringens was in fraud of Van Sweringens' creditors.

ARGUMENT.

A. THE JUDGMENT IS BASED UPON A CLAIM WHICH IS CONTRARY TO PUBLIC POLICY.

The judgment in this case is based on a claim which is illegal and condemned by public policy. Respondent, who stands in the position of Van Sweringens, has obtained a judgment on a claim which is essentially for compensation for a serious violation of fiduciary duty. Respondent contended, and the court found, that Van Sweringens made an agreement with Ball and Tomlinson under which Van Sweringens were to receive 8250 shares of Midamerica common in consideration of their services in obtaining a bargain purchase of the C. T. B. and Vaness collateral at the Morgan sale.*

At all relevant times Van Sweringens were the dominant directors and officers of C. T. B. and Vaness, and, therefore, they violated their fiduciary duties to these companies. *The Special Master, the District Court, and the Circuit Court of Appeals have all recognized that Van Sweringens violated their fiduciary duties. Under well settled principles of public policy, it therefore follows that respondent should have been denied recovery.*

Respondent's evidence was to the effect that the collateral bought by Midamerica had a fair and reasonable market value of more than $2,000,000 in excess of what Midamerica paid (R. 353-355, 395-396). The District Court found that J. P. Morgan & Co. and the associated banks which held the collateral had had close financial relationships with the Van Sweringens, including underwriting of more than $800,000,000 of securities of Van Sweringen companies and trusteeships for more than $1,000,-

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*Petitioner contends that Ball and Tomlison made no such agreement, and that the only agreement they did make is fully set out in the written agreement of September 21, 1935 (R. 2713), which was entirely valid and proper. The illegality, and the illegal agreement, result from the conclusions of the courts below, which conclusions petitioner challenges (See *infra* pp. 27 to 30).

000,000 of their securities; that during the critical period when the sale of the collateral was being arranged Van Sweringens were in almost daily communication with Morgan and arranged for the grouping of the collateral in a manner which facilitated the purchase by Midamerica; that Van Sweringens "by reason of their unusual relationship to [the Morgan group] and their negotiating skill and business acumen, * * * brought to Midamerica * * * the opportunity to purchase securities for $3,121,000 which, at the date of the purchase, had a far greater value to Midamerica, organized and officered as it was"; that all of the services were rendered on or prior to September 30, 1935, the date of the auction sale; and that for their services Van Sweringens were entitled to 55% of the Midamerica common stock (8250 shares) upon the payment of $1.00 per share (Findings No. 16, No. 17; R. 2980-2982).

Without proof of and reliance upon these services and the agreement, pursuant to which Van Sweringens were to be compensated, respondent could not have maintained his case. Furthermore, the record discloses that all of the banks whom respondent represents either participated in the wrongful activities of Van Sweringens, or were familiar with and gave approval to them.*

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* One of respondent's beneficiaries, Midland Bank, as a member of the Morgan Syndicate, had manifested some reluctance to acquiesce in the sale as arranged by Morgan. When Midland was allowed to participate in Midamerica's purchase, Midland acquiesced in the arrangements (R. 900-904). Midland was under the direct supervision of Cleveland Trust (another of respondent's beneficiaries), and a Vice-President of Cleveland Trust acted for Midland in the matter (R. 1408-1410). The executive committee of the Cleveland Trust formally approved Midland's participation in Midamerica (R. 908, 909).

A representative of Union Trust (another of respondent's beneficiaries) testified that a Morgan partner told him in May, 1935 that the price for the C.T.B. and Vaness collateral "would be lower if the deal was worked out to the satisfaction of the

(*Continued on next page*)

The basic question, therefore, is whether respondent—relying upon an agreement and activities involving serious violations of fiduciary duty—may be permitted to use the processes of a federal court to obtain a recovery.

1. The judgment is based upon a claim which is contrary to the public policy under the applicable local decisions.

Jurisdiction of the District Court was based solely on diversity of citizenship. When the defense of illegality was asserted it became the duty of the District Court to determine under the Indiana decisions what law governed the validity of the contract in controversy (*Klaxon Company v. Stentor Electric Manufacturing Company*, 313 U. S. 487). The contract which was given effect by the Court was not the written agreement, and the findings do not disclose the place of the making of the contract which was given effect. Under the evidence it might have been made in Indiana, Ohio, or New York. So far as performance is concerned the performance by Van Sweringens was partly in Ohio, partly in New York and partly by long distance telephone conversations between Ohio and New York. Where the place of performance of a contract and the place of making it differ the Indiana conflicts decisions do not clearly establish which law governs. *The Conflict of Laws*, Beale (1935), Sec. 332.22, pp. 1133-1135. However, it is well established in Indiana that a contract repugnant to the public policy of the forum is unenforceable. *Lake Shore & M. S. Ry. Co. v. Teeters*, 166 Ind.

(*Continued from preceding page*)

Cleveland bank creditors" (R. 267). Another representative of the Union Trust, who was also a spokesman for the Guardian Trust (the fourth of respondent's beneficiaries) testified that a Morgan partner had told him that Morgan "would be willing to make a very low price on the collateral." (R. 303). This same representative of Union and Guardian testified that with respect to the C.T.B. and Vaness collateral "our principal interest was that they be cheap enough" (R. 308).

335, 77 N. E. 599; *Vandalia R. Co. v. Kelly,* 187 Ind. 323, 119 N. E. 257; *Carl Hagenbeck & Great Wallace Show Co. v. Randall,* 75 Ind. App. 417, 126 N. E. 501.

As a practical matter it makes no difference whether the law of Indiana, Ohio, or New York governs the question for there is no significant difference in principle in the applicable decisions in any of these states. As hereafter shown *both lower courts have reached a result in conflict with the local decisions of Indiana, Ohio, and New York.* Under the law of each of these jurisdictions (a) it is a matter of public policy that corporate officers and directors adhere strictly to their fiduciary obligations, (b) agreements in violation of fiduciary relations and obligations are illegal, and (c) when a party in order to establish his claim relies upon and must prove an illegal agreement his claim will not be enforced.

Although the District Court found a breach of fiduciary duty, it did not expressly consider the illegality issue despite the fact that the defense was pleaded and exhaustively briefed. The Circuit Court of Appeals did consider the issue but erroneously held—

(a) that no question of public rights as distinguished from private rights was involved;

(b) that "Van Sweringens' activities, in violation of a fiduciary duty, could only affect the title of Midamerica to the assets purchased * * * [and] could not affect the arrangements between them and Ball as to the ownership of the 8250 shares" (R. 3056), i.e., that despite the breach of fiduciary duty by Van Sweringens, petitioner could not assert the resulting illegality as a defense against Van Sweringens' successor in interest, the respondent; and

(c) that the illegal transaction had been consummated.

Each holding is contrary to the applicable local decisions.

(a) *As to the public rights and public policy.*

The Circuit Court of Appeals in distinguishing *McMullen v. Hoffman*, 174 U. S. 639, cited by petitioner on the illegality issue, said that that case had involved collusive bidding on public works and hence affected public rights, but that there are no public rights involved in this case (R. 3054). This is an erroneous conception of the limitations of public policy. Many transactions are contrary to public policy which do not involve collusive bidding on public works, fraudulent use of public funds, or breach of a public trust. *Public policy questions have never been limited to such matters.*

In the present case C.T.B. and Vaness had aggregate debts which exceeded $100,000,000 (R. 1218-1220; 2465-2466). In the case of C.T.B. millions of dollars of securities were widely distributed in the hands of the public. Van Sweringens were the dominant officers and directors of these companies and the only persons purporting to act for them in connection with the Morgan sale—and at the same time they were pursuing their own selfish interests to procure a bargain purchase of the collateral pledged by the companies they pretended to serve. In such circumstances the fidelity and integrity of dominant officers and directors is a serious matter of public concern; and there is an unmistakable public policy against agreements made by persons in position of trust, such as officers or directors of corporations, which involve violations of fiduciary duty. The decisions of Indiana, Ohio and New York establish this proposition.

Typical is the holding of the Supreme Court of Ohio in *Thomas v. Matthews*, 94 Ohio St. 32, 113 N. E. 669:

> "A contract made by a director of a corporation that limits or restricts him in the free exercise of his judgment or discretion, or that places him under direct and powerful inducements to disregard his duties to the corporation, its creditors and other stockholders in the management of corporate affairs, is against public policy and void."

See also *Leader Pub. Co. v. Grant Trust & Savings Co.*, 182 Ind. 651, 661, 108 N. E. 121, 124; *Wayne Pike Co. v. Hammons, et al.*, 129 Ind. 368, 27 N. E. 487; *Schemmel v. Hill*, 91 Ind. App. 373, 385, 169 N. E. 678, 682; *Cleveland, etc. R. Co. v. Pattison*, 15 Ind., 70; *Munson v. Syracuse, etc. R. Co.*, 103 N. Y. 59, 8 N. E. 355; *Globe Woolen Co. v. Utica Gas & Electric Co.*, 224 N. Y. 483, 121 N. E. 378; *Landes v. Hart*, 131 App. Div. 6, 115 N. Y. Supp. 337.

C.T.B. was an Ohio corporation; Vaness a Delaware corporation (R. 639, 643). If the law of the state of incorporation should govern, the Ohio cases cited are apposite; and the Delaware law is to the same effect. *Guth v. Loft, Inc.*, 5 A. 2d, 503, 510.

(b) *As to the right of petitioner to assert the defense of illegality.*

The holding of the Circuit Court of Appeals that Van Sweringens' activities in violation of fiduciary duty could only affect the title of Midamerica to the assets purchased and could not affect the arrangements between Van Sweringens and Ball as to the ownership of the 8250 shares is manifestly erroneous. Wherever a contract is made between A and B which involves a violation of B's duty to C, it is always competent for A in a suit by B to point out the illegal nature of the agreement. Contracts which merely involve a transgression of contractual rights of third parties are illegal and unenforcible between the parties to the contract. (*Jackson v. Bryant*, 33 Ohio App. 468, 169 N. E. 825; *Reiner v. North American Newspaper Alliance*, 259 N. Y. 250, 181 N. E. 561.) *A fortiori* contracts which involve violation of fiduciary duties are illegal and unenforceable. See also *Cleveland, etc. R. Co. v. Pattison*, 15 Ind. 70.

(c) *As to the completion of the illegal transaction.* It is true that the illegal conduct, i.e., the breach of fiduciary duty was completed; but the *illegal agreement*, i.e., to give

the Van Sweringens 55% of the stock, *was not completed* and will not be completed unless the judgment herein becomes final. We recognize that in the law of illegal contracts there is an area in which it is difficult to know whether the illegality is so closely connected with a cause of action as to make it unenforceable. But this case is clearly outside that area.

In *Williston on Contracts,* Rev. Ed. p. 4982, it is said that *"a plaintiff cannot be allowed to recover if as a part of his case he is compelled to allege and prove unlawful acts or bargains * * *."*

Under this test respondent should clearly have been denied recovery. It is difficult to conceive of a more serious breach of fiduciary duty than that disclosed by respondent's evidence to the effect that C.T.B. and Vaness assets were bought for more than two million dollars less than their fair market value and that this bargain was procured directly through Van Sweringens' efforts. Furthermore the crucial findings of the District Court (Findings No. 16, No. 17; R. 2980-2982) when read in the light of the undisputed fact that Van Sweringens were in a fiduciary relation to C.T.B. and Vaness clearly disclose a most serious and reckless violation of fiduciary duty.

The Indiana decisions, the Ohio decisions, and the New York decisions show that whenever a party is required to prove an illegal agreement as a part of his case he cannot succeed. *Overshiner v. Wisehart,* 59 Ind. 135; *Western Union Telegraph Co. v. Yopst,* 118 Ind. 248, 20 N. E. 222; *Pagel v. Creasy, et al.,* 6 Ohio App. 199; *King & Co. v. Horton,* 116 Ohio St. 205, 156 N. E. 124; *Reiner v. North American Newspaper Alliance,* 259 N. Y. 250, 181 N. E. 561.

2. The illegality issue presents important questions of public policy which have not been, but should be, settled by this Court.

The existence of a strong local policy condemning the claim on which this judgment is based is clear. No state decision justifies enforcement of such a claim. Apart, however, from this strong local policy, we submit that there is also a federal public policy which should prevent enforcement of plaintiff's claim.

a. *The federal public policy against contracts involving a violation of fiduciary duty by officers and directors of corporations.*

The extension of corporate activities and the distribution of corporate securities through many states make the integrity of the conduct of large business corporations increasingly a matter of grave national concern (*Rogers v. Guaranty Trust Co.*, 288 U. S. 123, 149). The Van Sweringen holding company system was national in scope. The railroads under its control had book values in excess of $2,500,000,000 (R. 2705). Some of the securities involved in the sale were listed on the New York Stock Exchange and were traded in on a nation-wide basis (R. 1543). C.T.B. had outstanding over $80,000,000 of debt. Millions of dollars of bonds and land trust certificates of C.T.B. were widely held by the public. The record indicates that the holders of one issue of C.T.B. bonds resided in Kentucky, Pennsylvania, Colorado, New York, Michigan, Minnesota, Florida, Indiana, Wisconsin and Illinois (R. 2444). The conduct of a corporate business so far flung as that here involved affects the national economy at so many points as definitely to make the integrity and fidelity of its officers and directors a matter of national concern.

In several cases where jurisdiction of the federal courts was not based on diversity of citizenship, this Court has insisted upon scrupulous observance of fiduciary obligations and has condemned any deviation from such duties.

Taylor v. Standard Gas and Electric Co., 306 U. S. 307; *Pepper v. Litton*, 308 U. S. 295; *Securities and Exchange Commission v. Chenery Corporation*, 318 U. S. 80, 85.

If these decisions alone do not establish a compelling public policy on the subject, certainly when they are considered in conjunction with the many congressional declarations of public policy as evidenced by the Securities Act, the Securities and Exchange Act, the Interstate Commerce Act, and the Bankruptcy Act, it is clear that there is a strong federal public policy condemning contracts which involve violation of fiduciary duty.

b. *As to the duty of a federal court to refuse to enforce a claim which is contrary to federal public policy.*

We submit that federal courts, when their jurisdiction is based solely on diversity of citizenship, should hold a claim unenforceable when it is contrary to federal public policy even though the claim might not be contrary to local policy. By this we do not suggest a return to the doctrine of *Swift vs. Tyson*, 16 Pet. 1. Certainly if the public policy of a state holds a contract void, federal courts in cases where jurisdiction is based on diversity of citizenship must follow the state public policy. But even though under the state law a claim might not be against public policy, it is inconsistent with the fundamental integrity of federal courts for them to enforce a claim if it is contrary to a clear and unmistakable federal policy. For example, a "yellow dog" contract might be valid under the law of a particular state (as undoubtedly it is under the law of several of the states); and yet in view of the clear public policy of the United States (as evidenced by the several federal statutes dealing with labor relations) against such contracts and all that they imply, a federal court ought not to render judgments based upon such contracts.

This Court has already impliedly held—in a case where federal jurisdiction was not dependent on diversity of citizenship—that federal public policy requires a federal

court to refuse to enforce certain claims independently of any federal statute which is directly applicable. *Morton Salt Co. v. Suppiger,* 314 U. S. 488.

There has been no express holding by this Court in a case where federal jurisdiction is based solely on diversity of citizenship that a federal court must refuse to enforce a claim which is contrary to the policy of a federal statute or series of statutes. We submit that the questions involved in this proposition should be settled by this Court and that this case presents an opportunity for such settlement.

3. If the contract involved in this case is contrary to the public policy of the United States then the decision of the Court below is in conflict with the decision in McMullen v. Hoffman, 174 U. S. 639.

In Point 1 we showed that the contract on which respondent's judgment is predicated is contrary to the applicable local law, and in Point 2 we showed that the contract is contrary to the public policy of the United States.

From either of these premises it follows that the decision of the Court below is in conflict with *McMullen v. Hoffman,* 174 U. S. 639, wherein it was said—

> "In case where any action is brought in which it is necessary to prove the illegal contract in order to maintain the action, courts will not enforce it, nor will they enforce any alleged rights directly springing from such contract." 174 U. S. 639, 654.

Once the substantive local law has established that a claim is contrary to public policy, it becomes a matter of federal procedural law for a federal court in diversity jurisdiction to withhold its aid. If federal public policy holds an agreement to be illegal it follows from *McMullen v. Hoffman,* that wherever a party must prove and rely upon the agreement his alleged rights springing therefrom may not be enforced. The distinction between this case and *McMullen v. Hoffman* made by the Circuit Court

of Appeals (i.e., that the *McMullen* case involved public rights) is without merit for we have already pointed out there is a clear public policy forbidding contracts in violation of the fiduciary obligations of directors and officers. The principle of *McMullen v. Hoffman* is fully applicable and should be applied here.

4. The decision of the Circuit Court of Appeals is in conflict with the decision of the Circuit Court of Appeals for the Sixth Circuit in In Re Van Sweringen Co., 119 Fed. (2d) 231 on substantially the same matter.

Among the C.T.B. and Vaness collateral bought by Midamerica were claims against three companies which were in reorganization under Section 77B of the Bankruptcy Act. After the purchase Midamerica filed proofs of claim against these companies based on the obligations purchased. Van Sweringens were in a fiduciary relation to each of the debtors at the time of the purchase. The debtors resisted Midamerica's claims on the ground that by the purchase Van Sweringens had violated their fiduciary duties and that Midamerica should therefore be allowed only the nominal amounts paid for these obligations (an aggregate of $890 for claims having a face amount of more than $20,000,000). The District Court in Cleveland disallowed the claim except in a nominal amount and the Circuit Court of Appeals for the Sixth Circuit affirmed, holding that by reason of the violation of fiduciary duty by Van Sweringens and Van Sweringens' association with Midamerica, Midamerica was disabled from recovering any more than the nominal amount it had paid for the securities. *In re The Van Sweringen Company,* 119 Fed. (2d) 231. Certiorari was denied by this Court, 314 U. S. 671.

Although that case arose in a manner different from this case the facts involved were substantially the same (except that here the evidence discloses a more serious violation of fiduciary duty than appeared in those cases) and

yet in that case the breach of fiduciary duty prevented Midamerica from recovering any more than the nominal amount it had paid, whereas here the breach of fiduciary duty is the very basis of the judgment amounting to more than $3,000,000.

We recognize that a difference in the result of two identical cases arising in different circuits is permissible, for that is the corollary of the proposition that local law must govern; but here there is no difference in the applicable local law.

B. ESTOPPEL.

The lower courts failed to follow the applicable local decisions on estoppel.

The Circuit Court of Appeals recognized that the doctrine of quasi-estoppel is here applicable, but failed correctly to apply the doctrine under the applicable local decisions. Petitioner was found to have converted the Midamerica stock because it treated the stock as its own when Ball transferred the stock to it after the deaths of Van Sweringens. Respondent maintains this suit for the benefit of four Cleveland banks—Midland Bank, Cleveland Trust, Guardian Trust, and Union Trust. Midland owned 754½ shares of Midamerica stock under exactly the terms that Ball held his shares, i.e., subject to whatever rights Van Sweringens had. After the death of Van Sweringens, Midland treated its stock exactly as Ball and petitioner did, i.e., it assumed that it owned the stock outright and accordingly it sold the stock to petitioner at a profit of over $500,000. The other three Cleveland banks had an interest in Midland and as a result derived from said sale a financial benefit of approximately $380,000.

All four banks who are respondent's beneficiaries either actively participated in the sale by Midland to petitioner or approved and ratified the transaction and all derived and obtained financial benefit from it.

Nearly six years later respondent, as the trustee for the four Cleveland banks, brought this suit on a theory totally inconsistent with the position previously taken by these banks in the sale by Midland to petitioner. The unconscionable inconsistency in the position of respondent in maintaining this action on behalf of the four Cleveland banks gives rise to a quasi estoppel or an estoppel by election.

The Circuit Court of Appeals recognized the existence of an estoppel and modified the judgment of the District Court by reducing it by 55% of the amount that Midland received for the stock. It purported to apply the doctrine of quasi-estoppel but actually applied a kind of set-off or counterclaim. The applicable local decisions and the overwhelming weight of authority are to the effect that estoppel effects a complete disability of the person estopped. *Maxon v. Lane*, 124 Ind. 592, 24 N. E. 683 (entitled in the Northeastern Reporter "*Strafford v. Lane*"); *Wilmore v. Stetler*, 137 Ind. 127, 36 N. E. 856. The four Cleveland banks for whom respondent maintains his action were equal participants in the sale of Midamerica stock to petitioner and it is unconscionable for respondent to maintain on their behalf the inconsistent claim here made. The Court should therefore have effected a complete estoppel as to all of the Cleveland banks.

C. THE FRAUD OF CREDITORS QUESTION.

In holding the contract of September 21 to be in fraud of the Van Sweringen creditors, the lower court failed to follow applicable local law.

At the time Van Sweringens made the contract of September 21 they were insolvent. Their debts were incurred almost entirely as a result of loans made in 1930 and prior thereto. They had long controlled a holding company system that bore their name. They desired, and their creditors desired, that they continue to do so; but they had

no funds with which to buy the collateral necessary to continue their control. In these circumstances they sought to have their creditors provide the money to make the purchase (including the banks for whom this action was brought). At that time it was estimated the collateral could be acquired for $2,275,000 (Midamerica later paid nearly a million dollars more); nevertheless Van Sweringen creditors, including the banks for whom respondent sues, declined to make the investment (R. 337). As a last resort Van Sweringens came to Ball, a relative stranger.

Ball, together with Tomlinson, was willing to risk an investment of over two million dollars provided Van Sweringens would continue to manage the properties. Ball and Tomlinson, who were providing all the capital, had no obligation to give Van Sweringens any kind of an interest in Midamerica. They owed no duty to aid Van Sweringen creditors and had no desire to be in business with these creditors. If Ball and Tomlinson had merely hired Van Sweringens to manage the properties without reference to any kind of an interest in Midamerica stock, clearly Van Sweringens' creditors could not have complained. In order to assure themselves of Van Sweringens' continued interest in the enterprise and to give an incentive for good management, Ball and Tomlinson agreed that Van Sweringens might, when they became free of debt, acquire 55% (8250 shares) of the Midamerica common for $8250. Concurrently, however, Van Sweringens were compensated for services to Midamerica in an aggregate amount in excess of $133,000 —or at the rate of nearly $10,000 per month. Certainly such an arrangement cannot be said to have deprived Van Sweringen creditors of any rights to which they were entitled.

All of the direct evidence, including the testimony of respondent's witnesses, some of whom were representatives of respondent's beneficiaries, is to the effect that the written agreement was the only agreement ever made between Ball, Tomlinson and Van Sweringens.

The lower courts found that this agreement was in fraud of the Van Sweringens' creditors. We submit that the record clearly establishes that the written agreement was the only agreement ever made between Ball, Tomlinson and Van Sweringens and that under the applicable Indiana law such an agreement is not in fraud of creditors.

In *Wassam v. Raben*, 45 Ind. App. 221, 90 N. E. 636, the wife of a debtor invested her capital in a business which the debtor managed without any contract for compensation. The profits of the business were far in excess of those anticipated and the debtor took from the business only such sums as were required for his individual family expenses. His purpose in making the arrangements was "to prevent the fruits of his earnings from being diverted * * * to the payment of his creditors." When the trustee in bankruptcy of the debtor attempted to reach the profits of the business the Indiana court held that he could not do so.

If a man may give away his services to prevent the fruits of the business in which he is engaged from reaching his creditors, then certainly he can make an agreement under which he acquires the right to purchase stock after he becomes free of debt—particularly when for his services during the intervening period he is paid $133,000 for less than 14 months.

For the reasons above set forth Petitioner requests that the petition for a writ be granted.

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